FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 24 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. [redacted]38

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the SOUTHERN SURETY COMPANY OF NEW YORK,
Respondent.

BRIEF OF SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE SOUTHERN SURETY COMPANY OF NEW YORK, OPPOSING PETITION FOR WRIT OF CERTIORARI.

ALFRED C. BENNETT,
IRVIN WALDMAN,
Counsel for Respondent.

TABLE OF CONTENTS

	PAGE
STATEMENT	1
OPINIONS BELOW	2
ARGUMENT	3
CONCLUSION	16

TABLE OF CASES CITED

Aetna Casualty and Surety Co. et al. v. International Reinsurance Co. et al., 117 N. J. Eq. 190	13
Allemannia Fire Ins. Co. v. Firemen's Ins. Co., 209 U. S. 326	2, 3, 4, 7, 8, 10, 11
Blackstone v. Allemannia Fire Ins. Co., 56 N. Y. 104	4
Cashau v. Northwestern Nat. Ins. Co., 5 Biss. 476, Fed. Cas. No. 2499	4
Castellain v. Preston, 11 Q. B. D. 380	13
Cunningham et al. v. Republic Insurance Co. et al., 94 S. W. (2d) 140	13
Globe Nat. Fire Ins. Co. v. American Bonding & Casualty Co., 195 N. W. 728, 729	10
Globe National Fire Ins. Co. v. American Bonding & Casualty Co., 198 Iowa 1072	2, 11, 16
Herckenrath v. American Mutual Ins. Co., 3 Barb. Ch. 63	4
Hicks v. Poe, 269 U. S. 118	4
Hone v. Mutual Safety Ins. Co., 2 N. Y. 235	4

PAGE

Jackson v. St. Paul Fire and Marine Ins. Co., 99 N. Y. 124, 129-130 15

Pink v. Isle Theatrical Corp., 271 N. Y. 390 15

Poe v. Munich Reinsurance Co., 276 Fed. 949 12

Royal Ins. Co. v. Vanderbilt, 52 S. W. 168 16

United States in Use, etc. v. Federal Surety Co. et al., 72 Fed. (2d) 964, 967 ..... 4, 16

Yonkers & New York Fire Ins. Co. v. Hoffman Fire Ins. Co., 29 N. Y. Super. Ct. 316 4

TABLE OF STATUTES AND AUTHORITIES CITED

Cooley's Briefs on Insurance (2d Ed.), p. 6750, Vol. 7 4

Couch's Cyc. of Insurance Law, Sec. 2277, Vol. 8 4

Vance on Insurance, 2d Ed., 1930, pp. 942, 946 4

33 C. J. p. 57 4

50 Harvard Law Review, pp. 95-96 4

IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Petitioner,

vs.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the SOUTHERN SURETY COMPANY OF NEW YORK,
Respondent.

BRIEF OF SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF THE SOUTHERN SURETY COMPANY OF NEW YORK, OPPOSING PETITION FOR WRIT OF CERTIORARI.

Statement.

This brief is written in opposition to the petition of the Fidelity & Deposit Company of Maryland, the defendant-appellant in the Court below, for a writ of certiorari.

The action, originating as a test case, had for its purpose an adjudication of the effect of the reinsurance agreement involved herein. Such an adjudication will affect many insurance companies and is of great importance to the New York Insurance Department, in that many of the claims existing between the various companies in liquidation rest upon such a reinsurance agreement.

Opinions Below.

The District Court, in directing judgment in favor of the respondent after trial, wrote an opinion (R. 54), which is reported in 15 Fed. Supp. 715. It referred therein to the long line of decisions holding reinsurance to be an agreement to indemnify the reinsured "not against payment actually made but against liability actually incurred", pointed out the similarity between the reinsurance agreement in the case at bar and the reinsurance agreement in the case of *Allemannia Fire Ins. Co.* v. *Firemen's Ins. Co.*, 209 U. S. 326, and observed that the entire phraseology of the agreement indicated no intention to depart from the settled law as enunciated in the *Allemannia* case, and that the language used in the various clauses fortified that conclusion.

The Circuit Court of Appeals, in affirming the judgment of the Court below, wrote an opinion (R. 78), reported in 88 Fed. (2d) 630, wherein it advanced additional reasons for approving the judgment of the District Court. After referring to the *Allemannia* case and the similarity between the reinsurance agreement in that case and in the case at bar, it drew attention to the new "Standard Form of Reinsurance Agreement", prepared in 1915, seven years after the *Allemannia* decision, which "standard form * * * was almost literally the same as the form of 1930", which is the form of agreement employed in the case at bar (R. 47). It concluded that if there had been an intention by the Surety Association to make the standard forms of reinsurance agreement drafted in 1915 and 1930, agreements to indemnify against loss rather than against liability, language unequivocally manifesting that intention would have been used. The Court parenthetically alluded to the case of *Globe National Fire Insurance Co.* v. *American Bonding & Casualty Co.*, 198 Iowa 1072 (R. 81), wherein the 1915 form was construed adversely to the defendant

and said that it did not rely upon that decision as having been known to the Surety Association when their draftsmen drew the 1930 Standard Form, "though it is probable that that decision also was known". It disposed of the contention that the result unjustly enriches the plaintiff by remarking that while the recovery swells the funds available to pay its creditors in general, the *shareholders* do not profit thereby.

Argument.

The petitioner is liable to the respondent under the reinsurance agreement to the extent of one-half of the liability of the insolvent company in liquidation. Neither proof of payment nor notice of intention to pay by the reinsured is a prerequisite to recovery by the reinsured's Liquidator.

The petitioner contends that proof of payment by the reinsured of the loss under the bond is a condition precedent to a recovery by the Liquidator of the reinsured and endeavors to draw a distinction between the compact of reinsurance in the *Allemannia Fire Insurance Co.* v. *Firemen's Insurance Co.*, 209 U. S. 326, case and the agreement involved in the instant case.

It would serve no useful purpose to discuss each of the many cases cited in the petitioner's brief, most of which are not apposite and *none of which changes the rule of law enunciated in the Allemannia case that reinsurance is an agreement to indemnify against liability and not against loss.*

Mr. Justice PECKHAM, who wrote the unanimous opinion for the Supreme Court in that case, said (p. 332):

> "The term 'reinsurance' has a well-known meaning. That kind of a contract has been in force in the commercial world for a long number of years, and it is entirely different from what is termed 'double insurance', i.e., an insurance of the same interest. The contract is one of indemnity to the person or corporation reinsured, and it binds the reinsurer to pay to

> the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. It is not necessary that the reinsured should first pay the loss to the party insured before proceeding against the reinsurer upon his contract. The liability of the latter is not affected by the insolvency of the insured * * *. The claim of the reinsured rests upon its liability to pay its loss to the original insured, and is not based upon * * * ability to pay * * *."

The rule so expressed has been echoed and re-echoed time and again, before and since the writing of that decision.

Hicks v. *Poe*, 269 U. S. 118; *Hone* v. *Mutual Safety Ins. Co.*, 2 N. Y. 235; *Blackstone* v. *Allemannia Fire Ins. Co.*, 56 N. Y. 104; *Herckenrath* v. *American Mutual Insurance Co.*, 3 Barb. Ch. 63; 33 *C. J.*, p. 57; *Vance on Insurance*, 2d Ed., 1930, pp. 942, 946; *Couch's Cyc. of Insurance Law*, Sec. 2277, Vol. 8; *Cooley's Briefs on Insurance* (2d Ed.), p. 6750, Vol. 7; 50 *Harvard Law Review*, pp. 95-96; *United States in Use, etc.* v. *Federal Surety Co. et al.*, 72 Fed. (2d) 964, 967; *Cashau* v. *Northwestern Nat. Ins. Co.*, 5 Biss. 476, Fed. Cas. No. 2499; *Yonkers & New York Fire Ins. Co.* v. *Hoffman Fire Ins. Co.*, 29 N. Y. Super. Ct. 316.

The similarity of the compact of reinsurance in the *Allemannia* case and the contract of reinsurance in the instant case is portrayed in the subjoined parallel columns:

Contract of Reinsurance in the Allemannia Case.	**Contract of Reinsurance in the Instant Case.**
"10. Upon receiving notice of any loss or claim under any contract hereunder reinsured, the said reinsured company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, of the same, and of the date and probable amount of loss or dam-	"4. The Reinsured, upon the receipt at its home office of a notice of any claim or loss under the bond, shall give the Reinsurer prompt written notice thereof at the Reinsurer's home office. The term 'home office', wherever used herein, shall be deemed to mean the home office

age, and after said reinsured company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pennsylvania, a proof of its loss and claim against this company, upon blanks furnished for that purpose by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; and, upon request, shall exhibit and permit copies to be made of all other papers connected therewith, which may be in its possession.

"11. Each entry under this compact, unless otherwise provided in this contract, shall be subject to the same conditions, stipulations, risks and valuation as may be assumed by the said reinsured company under its original contracts hereunder reinsured, and losses, if any, shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions, as paid by the said reinsured company under its contracts hereunder reinsured; and in no event shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof."

in the United States. The Reinsured shall take charge of all matters arising under the bond in connection with claims. It shall decide whether or not it is liable thereunder, and shall determine the amount of its liability in case it decides that it is liable. It shall settle or compromise any claims and defend, settle, or compromise any suits, and take such other action, not involving the extension of credit or the advancing of money, in connection with any claim matter arising under the bond as it may deem advisable. Any such decision, determination, settlement, defense, compromise or other action of the Reinsured in connection with any claim matter arising under the bond shall be final and conclusive and unconditionally binding upon the Reinsurer; provided that no payment or other method of settlement by the Reinsured shall preclude the Reinsurer from showing that the alleged liability or any part thereof for loss under the bond exists or existed under some other bond or bonds given at any time by the Reinsured.

"The Reinsured's authority to handle and settle claims in accordance with its own judgment as outlined above shall not be annulled, abridged, or otherwise affected, if the Reinsured consults the Reinsurer, by letter, in conference, or otherwise, with reference to such handling and settling of claims; provided that the reservation of rights on the part of the Reinsured effected

by this paragraph shall apply only to matters and questions, the sole determination of which is left by this agreement in the hands of the Reinsured.

"If any loss hereunder shall be settled, wholly or in part, through the issuance by the Reinsured of a surety bond, the Reinsurer shall participate in such bond in the proportion defined in section 2 hereof.

"The Reinsurer's proportionate share of a loss under the bond, of costs and expenses as hereinafter defined, and of interest, shall be paid to the Reinsured upon proof of the payment of such items by the Reinsured, and upon delivery to the Reinsurer of copies of all essential documents concerned with such loss and costs and the payment thereof. The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date; provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond."

In the *Allemannia* case, Clause 10 required prompt notification, in the event of a loss by the assured of a reinsured, and the forwarding to the reinsurer of various papers "and a copy of the original receipt taken upon the payment of such loss". Clause 11 provided that the reinsurance agreement was to be subject to the same conditions, stipulations and risks as were assumed by the reinsured under its original policy "and loss if any shall be payable *pro rata* with, in the same manner, and upon the same terms and conditions as paid by the reinsured * * * and in no event shall this company be liable for an amount in excess of a ratable proportion of *the sum actually paid* to the assured * * * by the said reinsured company under its original contract hereunder insured".

In the "Standard Form" used here, the reinsured is required to give prompt written notice of any claim. The requirement as to the forwarding of papers or documents is omitted and, in place thereof, the reinsured is given *carte blanche* with respect to the settlement of any claim except "that no payment or other method of settlement by the reinsured shall preclude the reinsurer from showing that the *alleged liability or any part thereof for loss* under the bond exists or existed under some other bond or bonds given at any time by a reinsurer" (ll. 64-65).

As in the *Allemannia* case, where the liability of the reinsurer was limited to a ratable proportion *"of the sum actually paid"*, so in the case at bar the reinsurer's proportionate share of the loss is required to be paid upon "proof of payment".

The provision in the *Allemannia* case requiring a receipt for the payment of the loss to be produced when demand was made for the proportionate share by the reinsured evoked this explanation by Mr. Justice PECKHAM (p. 337):

> "That if the loss or claim has been in fact paid, then a copy of the receipt is to be sent, but *it does not mean that there must be payment before any liability on the part of the reinsuring * * * company exists.*" (Italics ours.)

The precursor of the "Standard Form of Reinsurance Agreement adopted by the Surety Association of America, 1-15-30" (R. 47), involved in the instant case, was the "Standard Form of Reinsurance Agreement adopted by the Surety Association of America, May 12, 1915" (R. 49), but seven years after the handing down of the decision of the Supreme Court of the United States in the *Allemannia* case, *supra*. The language of that agreement with respect to the giving of notice of intention to pay is almost precisely the same as is used in the agreement sued upon. The use of parallel columns is employed in order to show the similarity:

Language Used in the Standard Form of Reinsurance involved in the Instant Case.	**Language Used in the Standard Form of Reinsurance Agreement Adopted in 1915.**
"• • • The Reinsured may, however, give the Reinsurer written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to have its share of such loss in the hands of the Reinsured by such date; provided, however, that the Reinsurer in any event shall have a period of forty-eight hours, after the receipt of such written notice from the Reinsured, to mail or otherwise despatch its payment; and provided further that in any such case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee of the bond" (R. 47, ll. 74-79).	"• • • The Reinsurer may, however, give the Reinsurer at least ten days' written notice of its intention to pay the loss on a certain date, and may require the Reinsurer to pay its proportionate share of such loss before such date; but in that case the Reinsurer, if it desires to do so, may pay its share of the loss by means of a check drawn in favor of the obligee under the bond" (R. 49, ll. 36-39).

And, just as in the instant case, the agreement sued upon "does hereby reinsure • • • against loss", so also the Standard Form of Agreement adopted in 1915 "does hereby reinsure • • • against loss". The correspond-

ing provisions of these two agreements are again subjoined in parallel columns:

Language Used in the Standard Form of Reinsurance Involved in the Instant Case.	Language Used in the Standard Form of Reinsurance Agreement Adopted in 1915.
"In consideration of the premium payable under section 1 hereof , hereinafter called the Reinsurer, does hereby reinsure Fidelity and Deposit Company of Maryland, hereinafter called the Reinsured, under bond numbered , together with all riders attached thereto, hereinafter called the Bond, issued by the Reinsured in the penalty of Dollars, in favor of (obligee), and in behalf of , hereinafter called the Principal, against loss thereunder and against costs and expenses, as hereinafter defined, and interest. A copy of the bond is or may be attached hereto, and is hereby made a part of this agreement."	"In consideration of the premium stated in section 1 hereof , hereinafter called the Reinsurer, does hereby reinsure the Fidelity and Deposit Company of Maryland, hereinafter called the Reinsured, under bond numbered. , hereinafter called the bond, issued by the Reinsured in the penalty of Dollars, in favor of (obligee) and in behalf of (principal), against loss thereunder and against costs and expenses, as hereinafter defined. A copy of the bond is or is to be attached hereto, and is hereby made a part of this agreement."

There are other similarities too numerous to mention. The agreement sued upon is merely an amplification of the 1915 Standard Form. Fundamentally and basically, they are the same.

The 1915 Standard Form was considered in 1923, seven years before the Standard Form involved in the present case was adopted. *This twin brother of the agreement involved in the case at bar was held to be an agreement to reinsure against liability and not against loss, the Court holding that recovery could be had by the receiver of an insolvent reinsured without prior payment of the loss,*

under that agreement, and that such recovery from the reinsurer was for the benefit of general creditors:

> "The right of the receiver to recover is challenged upon the ground that the insolvent surety has discharged no part of its liability upon the bond executed for the benefit of appellee, and that, as it has suffered no loss, no recovery can be had in the name of the receiver. The contrary appears to be the well-settled rule. The reinsurance contracts are contracts of indemnity, and the receiver is entitled *to recover under the issues and facts of this case, either, for the benefit of general creditors without the prior payment of the loss insured upon the bond.*" (Italics ours.)
>
> *Globe Nat. Fire Ins. Co.* v. *American Bonding & Casualty Co.*, 195 N. W. 728, 729.

The similarity of the reinsurance agreement in the *Allemannia* case with the Standard Form of 1930 involved in the present case (R. 47) and both with the Standard Form adopted May 12, 1915 (R. 49), is most striking and leads to the conclusion that there was no intention on the part of the Surety Association of America, the sponsors of the Standard Form of Reinsurance Agreement adopted in 1915 as well as that adopted in 1930, to depart from or change the rule of law with respect to agreements of reinsurance, which through the centuries had been treated as contracts of indemnity against liability and had been reaffirmed as such by this Court in 1908 in *Allemannia* v. *Firemen's Insurance Co., supra,* and other cases.

The marked resemblance of the 1915 and 1930 Standard Forms of Reinsurance has been commented upon, as has also the fact that the 1915 Standard Form (R. 49) was drawn but seven years after the *Allemannia* decision. Eight years later, in 1923, the Supreme Court of Iowa analyzed that agreement in a controversy wherein the defendant contended that such agreement was one of indemnity against loss and not against liability, and held directly that it was one of insurance against liability wherein the

insolvent reinsured was not required to make payment to the primary assured before seeking recovery from the reinsurer of the latter's proportionate share of the risk.

Globe National Fire Insurance Company v. *American Bonding and Casualty Company, supra.*

Seven years later, in 1930, the Standard Form of Reinsurance Agreement upon which the instant action is predicated was adopted, which, in form as well as in substance, is, with the exception of a few added refinements, precisely the same as was the Standard Form of 1915.

It is submitted, that if it had been the intention of the sponsors of the Standard Form of 1915 (R. 49), drawn seven years after the Supreme Court decision in the *Allemannia* case, or its successor, the Standard Form of 1930 involved herein (R. 47), drawn seven years after the decision of the Supreme Court of Iowa in the *Globe* case, *supra,* or the intention of the parties to the 1930 Standard Form in the case at bar, to depart from or modify the ruling in the *Allemannia* case, holding that a reinsurance compact was an agreement for indemnity against liability and not against loss, and to depart from or modify the ruling in the *Globe* case that the 1915 Standard Form of Reinsurance Agreement was a contract for indemnity against liability and not against loss, it is reasonable to assume that they would have manifested such intent in unmistakable terms, would not have used the same language as was used in the 1915 Standard Form, and would have squarely said that the parties intended that the reinsurer should not be liable and should not be called upon to pay its pro rata share of the loss suffered by the reinsurer, unless and until the reinsured had made payment of the loss to its assured, that the reinsured should only be liable in such an event for its pro rata portion of the amount actually paid and that *no action could be brought by the reinsurer unless instituted within a certain time after actual payment.*

Clause 9 of the reinsurance agreement sued upon (R. 47, ll. 120-121) is particularly significant in showing that the parties did not intend actual payment by the reinsured to be a condition precedent to the right of recovery against the reinsurer. It provides that "No action shall be brought against the reinsurer hereunder unless brought within twelve months after the date of the *final settlement* of all obligations under the bond". *It does not require final payment* of all obligations or liquidation of all obligations or discharge of all obligations; *it refers merely to a settlement.* The identical clause is found in the 1915 Standard Form (R. 49, ll. 75-76). If "final settlement" in the 1915 Standard Form was not construed to mean payment by the Iowa Court, it is submitted that no basis exists now for changing its meaning or asserting that its transposition, without change of accompanying words, into the 1930 Standard Form has altered its meaning.

As used in the 1915 Standard Form construed by the Iowa Supreme Court, in other reinsurance agreements and in the reinsurance agreement in the case at bar, the connotation carried by the word "settlement" is not that of payment, but of adjustment or fixing of the amount of liability.

The term "final settlement" has been judicially defined as meaning not payment, but a determination of the amount due:

> "It argues that final 'settlement' here means payment. So to hold would run counter to the whole scheme of the agreement between the companies. What the Munich assumed was one-third of the liability * * *. The words 'final settlement' as used in this contract must be held to mean the fixing by agreement or judicial determination of the amount to be united on the bonds or policies for which the Munich assumed one-third liability."
>
> *Poe* v. *Munich Reinsurance Co.*, 276 Fed. 949.

The petitioner further contends that if the Liquidator is permitted to recover the proportionate share of reinsur-

ance without first paying the loss, it would invite little or no resistance to unfounded claims and open the door to fraud, because thus the insolvent estate could realize a profit by conceding liability for unfounded claims whenever the reinsurance would exceed the amount which the Liquidator could pay to the company insured under the bond as a general creditor. Further, that realization of a profit out of reinsurance "would be inconsistent with the fundamental principle of insurance", citing *Castellain* v. *Preston,* 11 Q. B. D. 380.

The case cited is not relevant. It involved no reinsurance and stands for the proposition that a marine or fire insurance policy is a contract of indemnity only under which a loss shall be fully indemnified and never more than fully indemnified. The case at bar is not concerned with a marine or fire policy or any other kind of an insurance policy. It is concerned with a reinsurance agreement, which is not a policy of insurance.

> *Aetna Casualty and Surety Co., et al.* v. *International Reinsurance Co., et al.,* 117 N. J. Eq. 190.
> *Cunningham, et al.* v. *Republic Insurance Co., et al.,* 94 S. W. (2d) 140.

On the question of fraud, it is well to observe that there is no such issue presented. The propriety and validity of the allowance of the claim by the Liquidator has been conceded (R. 24). Moreover, the insolvent reinsured is doing nothing. It is dissolved and a State officer is liquidating its assets for the benefit of creditors.

In passing, it may be noted that the agreement as construed does not shut the door to the defense of fraud by a reinsurer. The language of the reinsurance agreement (R. 47) which makes the "decision, determination, settlement, defense, compromise, or other action of the Reinsured in connection with any claim matter arising under the bond * * * final and conclusive and unconditionally binding upon the reinsurer" (ll. 62-63) does not, and can-

not by the wildest stretch of the imagination, be interpreted so as to preclude the reinsurer from resisting payment to the reinsured (or, in the case of insolvency, to the receiver), on the ground of fraud.

Assuming, but not conceding, that the purpose of the agreement is to give the reinsured a motive to exercise diligence in protecting the reinsurer from unfounded claims, as is contended by the appellant, this motive is not slain by insolvency, but is merged in the higher and broader motive *and duty* of a receiver or liquidator, to resist all unfounded claims, not merely for the benefit of the reinsurer or the reinsured, but for the benefit of all creditors of the reinsured and others interested in the estate thereof. If he does not perform his duties in the manner expected of him, and is guilty of fraud or negligence as a result of which the reinsurer is called upon to pay, as its proportionate share of the risk, an amount which might have been considerably lessened had the receiver or liquidator performed his duty and not been guilty of negligence or fraud, is it not obvious that payment could be resisted and the receiver or liquidator called to account by the reinsurer and the creditors of the insolvent company? The insolvent company in such an event is no more. Any motive which it might have had in allowing unfounded claims no longer exists. The receiver or liquidator would not benefit by any such negligence or fraud, and would leave himself open to personal liability for any such acts; any moneys recovered by him would inure not to his benefit, but to the benefit of the general creditors of the defunct company.

Nor does any question of profit enter. The *Southern* cannot make a profit; it is dissolved and out of business and its affairs and estate are being administered by the Superintendent of Insurance of the State of New York, as Liquidator thereof, for the benefit of creditors (R. 25).

In the case of an insolvent reinsured, the recovery of the full share from the reinsurer is not barred by the fact that the reinsured has not paid or will not pay its credi-

tors or its primary assured mentioned in the reinsurance agreement in full (see citations and authorities, *supra*).

Certainly there is no reason, let alone a good reason, why the reinsurer should be permitted to take advantage of the misfortune of the reinsured. The latter in no way failed to perform any of the terms, covenants and conditions of the contract between the insolvent company and the reinsurer on the part of the insolvent company to be performed (R. 23). Even its failure to perform its contract with its primary assured by reason of the intervention of the State of New York would not have excused its own assured from the performance of the contract insofar as he was concerned.

Pink v. *Isle Theatrical Corp.*, 271 N. Y. 390.

Just why the reinsurer, with respect to whom all the terms and conditions of the contract have been performed, should be privileged to take advantage of the misfortune of the reinsured, *which has in no way affected it,* is difficult to comprehend. The reinsurer entered into a reinsurance agreement under which it received a premium from the reinsured as a consideration for assuming the proportionate share of a risk up to and not exceeding a certain amount. A loss under the bond issued by the reinsured having occurred, the reinsurer is only being called upon to do that which it agreed to do for a consideration, viz.: pay its proportionate share of the risk. Why should the reinsured's misfortune, which has in no way injured the reinsurer and has not tended to diminish or wipe out the consideration which the latter received, excuse such reinsurer from the performance of the agreement? It is bound to pay such a proportion of the loss as its reinsurance bears to the sum originally insured.

Jackson v. *St. Paul Fire and Marine Ins. Co.*, 99 N. Y. 124, 129-130.

The money recovered is not for the benefit of the reinsured, but for the benefit of general creditors among which

is numbered the primary assured of the defunct company in the instant case. He shares this recovery ratably with other general creditors and enjoys the fruits of recoveries made from other reinsurers in the same manner as other primary assureds will enjoy the fruits of recoveries made by the respondent from the petitioner.

Royal Ins. Co. v. *Vanderbilt*, 52 S. W. 168.
Globe Nat. Fire Ins. Co. v. *American Bonding & Casualty Co., supra.*
U. S. in Use, etc. v. *Federal Surety Co.*, 72 F. (2d) 964, 967.

CONCLUSION

The petition for a writ of certiorari should be denied.

New York, May 12, 1937.

Respectfully submitted,

ALFRED C. BENNETT,
IRVIN WALDMAN,
Counsel for Respondent.